Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether one joint tortfeasor subject to general maritime law can be held jointly and severally liable to the plaintiff for the fault of another joint tortfeasor subject to state law under the Outer Continental Shelf Lands Act (OCSLA) when the plaintiff's action against the OCSLA joint tortfeasor has been dismissed, as a matter of law, for not being timely commenced?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Kevin P. Bertrand
Plaintiff-Respondent

John E. Graham & Sons
Defendant-Petitioner

Insurance Company of North America
Intervenor

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is not reported. The decision is attached to this Petition at pp. App. 3-App. 7.

The decision of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, is not reported. The decision is attached to this Petition at pp. App. 14-App. 20.

BASIS FOR JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 14, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) (laws and regulations governing lands):

> **(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction.**
>
> **(1)** The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf

and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other devise (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State of its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

> State taxation laws shall not apply to the outer Continental Shelf.
>
> **(B)** Within one year after September 18, 1978, the President shall establish procedures for setting [sic] any outstanding international boundary dispute respecting the outer Continental Shelf.
>
> **(3)** The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Limitations, 46 U.S.C. § 763a:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

Delictual Actions, LA. CIV. CODE art. 3492:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

Liability as solidary or joint and divisible obligation, LA. CIV. CODE art. 2324:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
>
> B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding Article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.
>
> C. Interruption of prescription against one joint tortfeasor, whether the obligation is considered joint and divisible or solidary, is effective

against all joint tortfeasors. Nothing in this Subsection shall be construed to affect in any manner the application of the provisions of R.S. 40:1299.41(G).

STATEMENT OF THE CASE

Kevin P. Bertrand sustained injury on December 10, 1989 when transferred from a vessel to a fixed platform off the coast of Louisiana. On October 15, 1990 suit against Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) was filed in the 16th Judicial District Court, St. Mary Parish, Louisiana. Mobil removed to the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, on November 8, 1990, invoking the district court's jurisdiction under 28 U.S.C. § 1331 pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331, et seq.

On April 24, 1992, twenty eight months after his accident, Bertrand filed a First Supplemental and Amending Petition against Grace Offshore Company, Inc. (Grace) which was governed by the OCSLA, and against John E. Graham & Sons (Graham), which was governed by the general maritime law. Grace owned and operated the crane aboard the fixed platform used to transfer Bertrand from the M/V MISS SYBIL, a vessel owned and operated by Graham.

The matter was tried before a jury on September 28-30, 1992, the Honorable W. Eugene Davis, United States Circuit Judge, Fifth Circuit Court of Appeals, presiding by designation. At the close of Bertrand's case

Mobil moved for judgment as a matter of law on the basis that it was not liable to Bertrand under the facts; which motion was granted. After Mobil's dismissal, Grace moved for judgment as a matter of law, claiming Bertrand's claims against it were time-barred. Under Louisiana law, which governed Bertrand's claims against Mobil and Grace under the OCSLA, Bertrand had one year from the date of his accident to sue a joint tortfeasor and suit against one would toll the limitations as to all. Mobil was the only defendant sued within a year. Upon Mobil being absolved of fault, Grace and Mobil were no longer joint tortfeasors. Consequently, Bertrand's suit against Mobil could not be considered as tolling the period of limitations against Grace. Grace's motion for judgment as a matter of law was granted.

Because Graham was a general maritime law defendant, Bertrand's claims against it were subject to a three year statute of limitations pursuant to 46 U.S.C. § 763a. Thus, at the close of Bertrand's case, Graham was the only defendant remaining before the Court. After Graham presented its case, this matter went to the jury. On September 30, 1992 the jury returned a verdict awarding plaintiff $346,000.00. It assigned 50% fault to Grace and 50% fault to Graham. The court entered final judgment on December 9, 1992 imposing joint and several liability against Graham for all Bertrand's damages.

Graham timely moved for Judgment as a Matter of Law and for New Trial pursuant to FED. R. CIV. P. 50 and 59 wherein the impropriety of joint and several liability was raised. The district court denied both motions. Graham timely appealed to the United States Court of Appeals for the Fifth Circuit. In response to the issue of

joint and several liability, the Fifth Circuit had only the following to say:

> Graham also contends that it should be forced to pay only the portion of damages proportionate to its share of fault. But it is a well-settled principle of maritime law that every one of several tortfeasors is liable for the full amount of an injured plaintiff's damages. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992); *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

(Appendix, p. App. 7).

By footnote, the court added: "Because of the jury's unchallenged finding that Bertrand was not contributorily negligent, the issue raised in the partial dissent in *Simeon* is not present in this case." (Appendix, p. App. 7).

It is to that decision this Petition is directed.

ARGUMENT

Fifteen years ago this Court invited critical examination of the continued advisability of joint and several liability in a maritime tort setting. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). The *Edmonds* court rejected withdrawing from the doctrine on the very narrow premise it might upset a congressional loss allocation scheme. 443 U.S. at 271-273. In spite of its holding, the analysis employed in *Edmonds* left the distinct impression that with the advent of comparative fault came an

erosion of the principles underlying joint and several liability and a more discriminating approach in its application.[1]

Instead of heeding the message of *Edmonds*, most of the courts below have chosen to interpret it as representing an unyielding reaffirmation of joint and several liability based on tradition.[2] The effect of this dogmatic approach has been to focus judicial attention on responding to the inequities engendered by the doctrine with remedial measures, rather than preventing the inequities in the first instance. The failure of the lower courts to understand and apply the underlying rationale of *Edmonds* points unerringly to the need for this Court to revisit and explicate the principles of *Edmonds* to avoid

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[1] Before concluding a withdrawal from joint and several liability was not warranted under the circumstances, this Court examined the history of joint and several liability, 443 U.S. at 259; rights and liabilities of shipowners and stevedores under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901 et seq., prior to its 1972 amendments, 443 U.S. at 261-262; congressional intent in amending the LHWCA's loss allocation scheme, 443 U.S. at 262-268; and the inequities prevailing in this conflux of interests. 443 U.S. at 268-271.

[2] *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987); *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988) (adopting the reasoning of *Self*; *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1079 (5th Cir. 1992), *cert. granted sub nom, McDermott, Inc. v. AmClyde and River Don Castings Ltd.*, ___ U.S. ___, 113 S.Ct. 3033 (1993); *Miller v. Christopher*, 887 F.2d 902, 904 (9th Cir. 1989).

the continuing stream of applications to this Court seeking relief from the injustice of uncritically accepted tradition.[3]

State law now carries the torch of innovation with respect to loss allocation in a comparative fault environment. The response of many states, a number of which are coastal, to the eroding justification for joint and several liability, has been to modify the doctrine's application.[4] This evolution has resulted in a significant disparity between the rights and liabilities of litigants governed by state law and those governed by general maritime law.

Such disparity would generally present no need for this Court's intervention. But when, as in this case, litigants whose rights and liabilities are governed by both bodies of law are considered joint tortfeasors, the disparity in their treatment begins to impact upon significant national interests regarding the interrelation between state and maritime law. The disparate treatment and its impact upon the national interest is further magnified here by the antithetical policies underlying general maritime law and the Outer Continental Shelf Lands Act

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[3] *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068 (5th Cir. 1992), *cert. granted sub nom, McDermott, Inc. v. AmClyde and River Don Castings Ltd.*, ___ U.S. ___, 113 S.Ct. 3033 (1993) and *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir. 1993), *cert. granted sub nom, Boca Grande Club, Inc. v. Florida Power & Light Co., Inc.*, ___ U.S. ___, 114 S.Ct. 39 (1993).

[4] E.g., California, CAL. CIV. CODE § 768.81; Hawaii, HAW. REV. STAT. § 663-10.9; Louisiana, LA. CIV. CODE art. 2324; Mississippi, MISS. CODE ANN. § 85-5-7; New Hampshire, N.H. REV. STAT. § 507:7-e; Oregon, OR. REV. STAT. § 18.485.

(OCSLA), 43 U.S.C. § 1333, through which the adjacent state's law is applied as surrogate federal law. Once the proud leader in the formulation of flexible and fair approaches to loss allocation, federal maritime law has now fallen behind due to its insistent adherence to the increasingly archaic principles of joint and several liability.

I.

THE EVOLUTION OF LOSS ALLOCATION LEAVES NO JUST REASON TO APPLY JOINT AND SEVERAL LIABILITY IN THIS CASE

In the early evolution of loss allocation for tortious conduct, legal systems were unwilling to apportion damages between the parties at fault.[5] W. PROSSER & P. KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 65 at 452-453 and § 67 at 470 (5th ed. 1984). No inequity was initially seen in joint and several liability because attention was not focused on whether one was being held liable for the wrong of another. Instead, the basis for imposing all the victim's damages upon any one joint tortfeasor was that each was responsible for all of which his wrong was *a* cause. *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421, 1437 (5th Cir. 1988) (Garwood, J., concurring in part and dissenting in part), *cert. denied*, 490 U.S. 1106 (1989); W. PROSSER & P. KEETON, § 47 at 328. This applied with equal force to the victim's conduct, thereby preventing his

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[5] Of course the law of admiralty stands as an exception to this early reluctance. See, *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 480 (1975) (tracing the divided damages rule in maritime collisions to the 12th Century Laws of Oleron).

recovery if his conduct is found to be *a* cause. *Simeon*, at 1437-38; W. PROSSER & P. KEETON, § 65 at 452.

As loss allocation evolved into comparative fault, the resulting unfairness in holding either the victim or a joint tortfeasor responsible for all of which his wrong was *a* cause became increasingly difficult to justify. Under comparative fault the victim was relieved of the unjust total bar to recovery. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1975); *Simeon*, 852 F.2d at 1438. Victim fault now simply reduced the award by the proportion his own wrong contributed to his harm. Joint tortfeasors were not so relieved. Despite comparative fault's intrusion on the historical basis for joint and several liability joint tortfeasors remained subject to the doctrine's inequities.

The original basis upset, joint and several liability came to rest on the need to protect victims from insolvent parties, *Edmonds*, 443 U.S. at 275 n.2, 99 S.Ct. at 2764 n.2 (Blackmun, J., dissenting); *Simeon*, 852 F.2d at 1438, 1454 (Garwood, J., concurring in part and dissenting in part and King, J., specially concurring); C. Gregory, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS, 142 (1936), and there it precariously stands today. As other relics of loss allocation, such as contributory negligence, have drifted into the realm of historical perspective, joint and several liability persists in the once cutting edge law of admiralty, too often justified on the basis that it is "a well-settled principle of maritime law[,]" and nothing more.

Graham acknowledges there may be a need to protect victims from fortuitous circumstances affecting their recovery. But, when there is no insolvent joint tortfeasor,

nor one granted tort immunity, the harsh results produced by joint and several liability are indefensible. Moreover, when the remedy generally employed to lessen the doctrine's unfairness, contribution, becomes clouded and uncertain due to competing policies, such as those sustaining statutes of limitations, the OCSLA and other traditional, more forceful principles of admiralty law, joint and several liability begins to assume the archaic qualities of its historical siblings. Finally, when the harm from which joint and several liability protects the plaintiff is one solely a product of his own making, application of the doctrine loses all validity.

Grace is neither insolvent nor legislatively tort immune. Rather, Grace is a joint tortfeasor whose fault for Bertrand's damages is equal to Graham's. The only reason Grace was not before the trial court at the time of judgment was because Bertrand failed to timely file suit against it. The imposition of joint and several liability against Graham by the courts below is therefore wholly devoid of any recognized purpose currently underlying the doctrine.

One may seek to rely on Graham's conduct as *a* cause of Bertrand's damages to justify joint and several liability in this instance. But comparative fault principles render this traditional justification suspect outside its original framework. Furthermore, any such justification, which has more recently been limited to instances where the plaintiff is innocent and contribution is available against the other tortfeasor, *Edmonds*, 443 U.S. at 271 n.30, loses its forcefulness here.

Bertrand is not innocent. He inexcusably failed to timely pursue his cause of action against Grace, which resulted in Grace obtaining a judgment as a matter of law dismissing Bertrand's claims against it. This neglectful delay should alone be sufficient to reject joint and several liability. Any other result requires the policies supporting joint and several liability to override those supporting statutes of limitations; an unacceptable conclusion. Moreover, joint and several liability against Graham needlessly imposes uncertainty and lack of uniformity in the general maritime law and exposes Grace to liabilities it would not face under the OCSLA. Accordingly, the rulings of the courts below cannot stand.

II.

STATUTES OF LIMITATIONS OVERRIDE JOINT AND SEVERAL LIABILITY WHEN PLAINTIFFS SLEEP ON THEIR RIGHTS

The very fact that Graham must advance argument on the policies supporting Grace's statute of limitations defense is strong evidence of the need for a solution to the problem of joint and several liability. But, the general rule that a statute of limitations defense as to the plaintiff's claim is no defense to a contribution claim[6] compels Graham to do so. This rule is difficult to justify, but it would appear the most plausible reasons are: (1) contribution is required to remedy the injustice joint and several liability has already inflicted upon the party

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[6] See discussion infra at p. 15.

subsequently seeking contribution; and, (2) in such context the policies advanced by statutes of limitations must give way to the need to remedy that injustice.

But a different solution is easy to justify if the advisability of joint and several liability is scrutinized before it is allowed to adversely impact the rights and liabilities of those concerned. At this stage, the interest sought to be protected by joint and several liability, as opposed to contribution, can be weighed against those protected by statutes of limitations. When this is done it becomes readily apparent the plaintiff should not be allowed to use joint and several liability to circumvent a statute of limitations unless some interest substantially more compelling than those protected by joint and several liability are at risk.

The primary purpose of statutes of limitations is to assure fairness to defendants. *Burnett v. New York Central Railroad Company*, 380 U.S. 424, 428 (1965). Statutes of limitations:

> [P]romote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Id. (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-349 (1944)). "Moreover, the courts ought to be relieved of the burden of trying

stale claims when a plaintiff has slept on his rights." *Burnett*, 380 U.S. at 428.

Louisiana's concept of liberative prescription is parallel to a statute of limitations. Like statutes of limitations, liberative prescription is a procedural bar to legal actions not timely instituted. La. Civ. Code art. 3492. Its roots are in considerations of social stability and procedural fairness. "[Liberative prescription] is socially useful in that it puts an end to litigation and terminates the uncertainty of the debtor." Comment, *Revision of the Civil Code Provisions on Liberative Prescription*, 60 Tul. L. Rev. 379, 380 (1985) (hereinafter "Comment"). "Commentators and courts agree that the potential injustice of liberative prescription – nonpayment of a debt justly owed – is outweighed by the greater evil of interminable liability." *Id.* Further:

> "In terms of social utility, prescription can be compared with the rules of res judicata. Their function is analogous. There comes a moment when it is necessary to say the last word, where the uncertainty of the law is more burdensome than injustice. Even if prescription seems to lead in some rare cases to results contrary to equity . . . it can easily be forgiven in exchange for the great services it renders to society. Without it there would be no security in transactions, no stability in private estates, no peace among individuals, no order in the state."

Comment, 60 Tul. L. Rev. at 380-381 n.13 and n.14 (quoting G. Baudry-Lacantinerie & A. Tissier, *Traite Theorique et Pratique Du Droit Civil* n.29 (4th ed. La. State L. Inst. trans. 1972)).

The situs of Bertrand's accident was an OCSLA facility off Louisiana's coast. Because the statute of limitations of the "adjacent state" applies to personal injury actions which occur on fixed structures on the outer continental shelf, 43 U.S.C. § 1333(a)(2)(A); *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). Louisiana's one year liberative prescription and the policies sought to be advanced thereby apply to Bertrand's claim against Grace.

In light of the compelling interest advanced by both the nation's and Louisiana's limitation periods, Bertrand cannot seriously ask that the courts allow him to do through joint and several liability what he could not do directly. This back-door loss allocation approach smacks of impropriety. Additionally, the possibility contribution may be denied further offends the sensibilities.

III.

CONTRIBUTION CANNOT REMEDY THE INEQUITY OF JOINT AND SEVERAL LIABILITY IN THE GENERAL MARITIME LAW/OCSLA MIX

Contribution is the remedy afforded a joint tortfeasor to alleviate the unfair allocation of responsibility produced by joint and several liability. *Edmonds*, 443 U.S. at 271 n.30; *Hardy v. Gulf Oil Corporation*, 949 F.2d 826, 829 (5th Cir. 1992); W. Prosser & P. Keeton, § 50 at 337-338. It also remedies the unjust enrichment of the joint tortfeasor. *Edmonds*, 443 U.S. 271 n.30, (citing Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 136 (1932)). This Court recognized the viability of contribution in a noncollision maritime case twenty

years ago in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

Such esteemed recognition notwithstanding, the availability and application of contribution remains shrouded in uncertainty.[7] Of particular significance is a split among the circuits on the availability of contribution against the United States once the two year statute of limitations in the Suits in Admiralty Act, 46 U.S.C. § 745, has run on the plaintiff's action. The general rule is that the running of the statute of limitations against the original plaintiff's action does not bar a suit for contribution because the cause of action for contribution does not arise until the party seeking contribution pays the original plaintiff. W. PROSSER & P. KEETON, supra, § 50 at 340. *Central Rivers Towing v. City of Beardstown*, 750 F.2d 565 (7th Cir. 1984), its source decision[8] and progeny,[9] follow

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[7] Undoubtedly this Court's recent granting of certiorari in *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068 (5th Cir. 1992), *cert. granted sub nom, McDermott, Inc. v. AmClyde and River Don Castings Ltd.*, ___ U.S. ___, 113 S.Ct. 3033 (1993) and *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir. 1993), *cert. granted sub nom, Boca Grande Club, Inc. v. Florida Power & Light Co., Inc.*, ___ U.S. ___, 114 S.Ct. 39 (1993) will alleviate much of the obscurity that has prevailed over contribution in cases involving settling joint tortfeasors. Of course, depending on the Court's reasoning and conclusions reached in *McDermott* and *Boca Grande* and the extent to which they might impact upon the analysis and decisions of the lower courts in this case, summary disposition of this petition and remand for reconsideration might be in order.

[8] *Thornton v. Town of Hull*, 515 F.Supp. 715 (D. Mass. 1981).

[9] *Sea-Land Services, Inc. v. United States*, 874 F.2d 169 (3rd Cir. 1989); *Loeber v. United States*, 803 F.Supp. 1154 (E.D. La.

this general rule. To the contrary are *United New York Sandy Hook Pilots Assoc. v. United States*, 355 F.2d 189 (2nd Cir. 1965) and its progeny,[10] which hold the cause of action for contribution accrues at the time of the original plaintiff's injury and is time-barred if not brought against the United States within two years thereof.[11]

The complications this split of authority presents with respect to Graham's ultimate liability in this case are magnified by the overlapping tension existing between the general maritime law and the OCSLA. The rules of the former are founded upon "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country[,]' ", *Miles v. Apex Marine Corp.*, 498 U.S. 19, ___, 111 S.Ct. 317, 323 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)); while the latter is a Congressional rejection of national uniformity, as well as federal admiralty law, in favor of familiarity of the litigants with the adjacent state law applied as surrogate

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1992); *Subaru of New England, Inc. v. General Ship Corp.*, 142 F.R.D. 578 (D. Mass. 1992).

[10] *Complaint of American Export Lines, Inc.*, 568 F.Supp. 956 (S.D. N.Y. 1983); *Twenty Transfer Corp. v. Tracy Towing Line, Inc.*, 1969 A.M.C. 1207 (S.D. N.Y. 1969); *Hallmark Ins. Co. v. Canadian Pacific R.R.*, 1978 A.M.C. 409 (W.D. Mich. 1977); *Brown v. United States*, 615 F.Supp. 391 (D. Mass. 1985), *reversed on other grounds*, 790 F.2d 199 (1st Cir. 1986); *H-10 Water Taxi Company, Ltd. v. United States*, 379 F.2d 963 (9th Cir. 1967).

[11] For a summary of the criticism that has been levied against *Sandy Hook* and brief review of the split among the circuits see *Subaru of New England, Inc. v. General Ship Corp.*, 142 F.R.D. 578 (D. Mass. 1992).

federal law. 43 U.S.C. § 1333(a)(2)(A); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. at 359-366; *Chevron Oil Company v. Huson*, 404 U.S. at 100-104. At least one circuit has examined the availability and application of contribution when the liability of the joint tortfeasors arises under these two antithetical bodies of law.

In *Marathon Pipe Line v. Drilling Rig Rowan/Odessa*, 761 F.2d 229 (5th Cir. 1985), the Fifth Circuit concluded a tortfeasor found liable to the plaintiff under general maritime law could seek contribution from a joint tortfeasor whose liability as to the original plaintiff would be measured by Louisiana law under the OCSLA.[12] 761 F.2d at 233-236. While Graham is comforted by the holding in *Marathon*, it must, at the risk of jeopardizing its contribution claim against Grace, express concern over the reasoning of *Marathon*.

To reach the conclusion contribution was available to the maritime law defendant, a foundational issue was decided critical to the issues herein. Admitting "[t]he result may indeed differ dependent on what body of law governs (a) the availability of a [contribution] claim . . . , (b) when that cause of action accrues, and (c) when it becomes time-barred[,]" 761 F.2d at 233, the Fifth Circuit found general maritime law controlling because the body of law establishing the primary liability of the party

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[12] At issue in *Marathon* was a claim for tort-based indemnity. The Fifth Circuit nonetheless referred to "contribution and indemnity" in the same breath, undoubtedly due to the lack of significant distinction between the two in principle. Cf. F. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165, 1166-1167 1171-1172 (1981).

seeking contribution governs the claim for contribution. 761 F.2d at 235-236. On this basis, and because the action for contribution in general maritime law does not accrue until the principal defendant is cast in judgment on the principal demand, the court concluded laches did not bar the contribution action on the facts. 761 F.2d at 236.

But the *Marathon* decision fails to address the constitutionally based principle of uniformity underlying federal admiralty law, the intent of Congress that the OCSLA provide litigants with a body of law with which they are familiar or the policies advanced by statutes of limitations. These failures could potentially undermine the holding in *Marathon*. Consider the situation had Bertrand timely sued Grace but never brought Graham into the primary action. Protracted litigation results in a judgment against Grace for all Bertrand's damages a substantial number of years after the three year statute of limitations[13] applicable to Graham has run. Under the *Marathon* rationale Graham is subject to a claim for contribution by Grace governed by Louisiana law under the OCSLA, a body of law which rejects uniformity. A similar result can occur if the OCSLA situs happens to be adjacent to a state whose legislature has opted for a statute of limitations longer than that applicable in the general maritime law.

Viewing *Marathon* from the standpoint of Grace, the contribution action defined therein, together with the current "well-settled" status of joint and several liability in general maritime law, presents Grace with a risk of exposure not present in Louisiana. Pursuant to La. Civ.

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[13] 46 U.S.C. § 763a.

CODE art. 2324, Louisiana has adopted a modified approach to joint and several liability, or solidarity, as that doctrine is called in Louisiana. Article 2324 imposes joint and several liability upon joint tortfeasors only to the extent necessary for the plaintiff to recover one half of his damages. Under the facts of this case, if Article 2324 governed the liability of both Grace and Graham, then contribution would be unnecessary because Graham would only be required to pay its share of Bertrand's damages.

Additionally, if Louisiana law also controlled both of Bertrand's causes of action against Grace and Graham, with the exception that different limitation periods continued to apply, whether Grace would be liable for contribution to Graham, and whether Graham would be liable to Bertrand for more than its share of his damages is, at best, uncertain. In *Ferguson v. Lankford*, 374 So.2d 1205, 1208 (La. 1979), dicta of the Louisiana Supreme Court hinted towards accepting the general rule allowing contribution even though the plaintiff could not proceed directly against the joint tortfeasor because his action was time-barred. The *Ferguson* holding, that the shorter limitation period could not be revived once it had run, has maintained its strength in Louisiana law. *Whitnell v. Menville*, 540 So.2d 304, 308 (La. 1989). The same is not true of the dicta, however, whatever its forcefulness might ever have been.

A decade later, in *Perkins v. Scaffolding Rental & Erection Service, Inc.*, 568 So.2d 549, 550-551 (La. 1990), Louisiana's highest court unveiled subrogation as the source of contribution. Cf. LA. CIV. CODE arts. 1804-1805. The issue

in *Perkins* was whether a defendant had a right of contribution against an alleged joint tortfeasor who obtained a definitive judgment of dismissal from the plaintiffs' action two years earlier. Because subrogation to the rights of the plaintiffs was the substantive basis for seeking contribution, the court concluded the defendant had no greater rights than did the plaintiffs against the alleged joint tortfeasor and *res judicata* precluded contribution. Interestingly, the court analogized the plaintiffs' failure to state a cause of action against the alleged joint tortfeasor, the failure to amend their petition, and the failure to appeal the judgment of dismissal two years earlier to a tacit release of the alleged joint tortfeasor's obligation, *Perkins*, 568 So.2d at 551, which under current Louisiana law would have inured to the benefit of the defendant reducing its liability to the plaintiffs in proportion to the alleged joint tortfeasor's liability. See La. Civ. Code art. 1803.

Applying either Article 2324 or the principles announced in *Perkins* to Grace it is easy to see how the intent of Congress reflected in the OCSLA is offended. Article 2324 would protect Grace from contribution because Graham would not be liable to Bertrand for that portion of the damages Grace caused. The *Perkins* tacit release analogy, because it was based on subrogation, the source of contribution in Louisiana, applies with equal force to Bertrand's failure to timely prosecute his cause of action against Grace. Hence, two results appear warranted under Louisiana law; (1) Grace is not liable for contribution, because (2) the release of Grace inures to the benefit of Graham by reducing their joint obligation

to Bertrand by Grace's proportional fault. But under *Marathon* Grace is faced with an exposure pursuant to general maritime law contribution which it would not likely be subject to under the OCSLA.

The application of joint and several liability against Graham offends both the general maritime law and the OCSLA because the remedy of contribution is incompatible in the mix. Uniformity is destroyed by the uncertainty surrounding contribution and the potential that a general maritime law defendant could be subject to adjacent state law contribution under the Fifth Circuit's rationale in *Marathon*. OCSLA defendants are exposed to liabilities through contribution they would not otherwise have under adjacent state law. These inequities should not be forced upon defendants or the courts when a plaintiff has slept on his rights.

CONCLUSION

This Court is free to change the rule of joint and several liability. *Edmonds*, 443 U.S. at 271. The teaching of *Edmonds* is clear; a more discriminating approach to joint and several liability is required. A workable solution would be to apply the doctrine only when the interests it is intended to protect are present. If such interests are present, they should then be balanced against whatever policies underlie the legal framework within which the doctrine is sought to be applied. Finally, in situations where the interests protected by joint and several liability are at odds with the policies underlying the legal framework, the doctrine should only be applied if there is some

overwhelmingly compelling need. Such an approach is exemplified by the analysis used in *Edmonds*.

Recent history has shown that lower courts will not employ such methodology unless specifically instructed by this Court to do so. They have chosen instead to cling to joint and several liability too often on nothing more than its "well- settled" status in maritime law. Such dogmatic adherence to the doctrine needs to be banished from this body of law usually commended for its flexibility and fairness. Otherwise, general maritime law will continue to undermine countless more compelling interests in an increasingly complex offshore environment.

None of the interests sought to be protected by joint and several liability are present in this case. Grace is only absent because Bertrand failed to timely commence his action against it. As a result, the policies underlying statutes of limitations, general maritime law and the OCSLA overwhelmingly compel a rejection of joint and several liability. Bertrand cannot be allowed to impose on Graham the burden of his mistake. The petition for a writ of certiorari should be granted.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
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NEW ORLEANS, LA 70130

February 9, 1994

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 93-4338 – BERTRAND, ET AL., v. MOBIL OIL, ET AL.
(D.C. No. 90-CV-2452)

The following action has been taken in the above case:

( ) AN EXTENSION OF TIME has been granted to and including

  ( ) for filing appellant's/petitioner's brief.

  ( ) for filing appellee's/respondent's brief.

  ( ) for filing reply brief.

  ( ) for filing petition for rehearing.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief *amicus curiae* is granted.

( ) Joint motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

(X) The unopposed motion for stay of mandate is hereby GRANTED.

CHARLES R. FULBRUGE III, Clerk

By: /s/ Louise C. Higgins
Deputy Clerk

✓Mr. W. Gerald Gaudet
Mr. R. scott Ramsey, Jr.
Mr. Michael J. Remondet, Jr.

MOT-2

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4338
Summary Calendar

KEVIN P. BERTRAND,

Plaintiff-Appellee,

VERSUS

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Defendant,

GRACE OFFSHORE COMPANY, INC.,

Defendant,

and

JOHN E. GRAHAM & SONS,

Defendant-Appellant,

VERSUS

INSURANCE COMPANY OF NORTH AMERICA,

Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(90 CV 2452)

(Filed Jan. 14, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Kevin Bertrand, a filtration technician employed by Pro-T Company, was dispatched to a Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil"), fixed production platform located in the Gulf of Mexico and was injured during a transfer from the M/V MISS SYBIL to the platform. John E. Graham & Sons ("Graham"), the owner and operator of a vessel used to transfer Bertrand, appeals the district court's denial of judgment as a matter of law after a jury verdict in Bertrand's favor. Finding sufficient evidence to support the verdict, we affirm the judgment of the district court, including the imposition of full damages against Graham.

I.

On December 10, 1989, Bertrand was dispatched to a job on a Mobil fixed production platform located in South Marsh Island Block 205, in the Gulf of Mexico. Grace Offshore Company ("Grace") had previously contracted with Mobil to provide the rig in connection with workover operations. Graham had contracted with Mobil to provide transportation support services in connection

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the profession." Pursuant to that rule, the court has determined that this opinion should not be published.

with personnel and supplies transported from the Mobil base in Louisiana to various offshore platforms.

Bertrand was assigned to be transported to Block 205 on board the M/V MISS SYBIL, a 140-foot crew-supply vessel owned and operated by Graham. After arriving at the platform, Bertrand was off-loaded from the vessel onto a platform by way of a Billy Pugh personnel basket attached to a crane operated by Grace. The wind conditions and wave heights were disputed at trial, but Bertrand testified that he heard a "crunch" when the basket was lifted off the deck of the vessel. Bertrand later complained of neck stiffness and ultimately was diagnosed as having ruptured two cervical disks.

On October 15, 1990, Bertrand brought suit in state court against Mobil. Mobil removed the case to federal court, and in March 1992, Bertrand named Graham and Grace as additional defendants. On April 21, 1992, the Insurance Company of North America ("INA") filed an intervention in the matter, seeking to recover longshore and harbor workers' compensation benefits.

At the close of the plaintiff's case at trial, Mobil and Grace were dismissed on their motions, Mobil as a result of lack of "operational control" and Grace as a result of not being a solidary obligor with a defendant that had been sued within a year. The jury returned a verdict for Bertrand in the amount of $346,000 plus legal interest on $98,500, assigning fifty percent fault to each of Graham and Grace. The district court also granted judgment in favor of INA against Bertrand. Graham filed a motion for judgment as a matter of law, which was denied.

II.

Graham argues that the district court erred in denying its motion for judgment as a matter of law, an issue we review *de novo*. *Charles E. Beard, Inc. v. McDonnell Douglas Corp.*, 939 F.2d 280, 282 (5th Cir. 1991). Judgment as a matter of law will be granted only if, under the governing law, there can be but one reasonable conclusion as to the verdict. As in the case of a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 740 (5th Cir. 1993). Furthermore, the inferences are to be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Barnett v. I.R.S.*, 988 F.2d 1449, 1453 (5th Cir. 1993).

Graham claims that there was no evidence to support the jury's finding that Bertrand was injured during the transfer to the platform and that there was no evidence to support the jury's finding that Graham was liable for the alleged injury. We disagree.

As to the existence of an injury, several doctors testified that Bertrand hurt his neck somewhere between the dock and the rig and that it was possible that he was injured while being abruptly lifted by the crane. Furthermore, Bertrand testified that he heard a "crunch" while being lifted. Although the evidence did not conclusively show that the injury occurred during the crane transfer,

the jury decided that Bertrand hurt his neck at that time. This determination was based upon sufficient evidence.

As to the liability issue, Bertrand alleged that Graham negligently allowed the transfer to take place in rough weather and high seas. Bertrand's expert testified that it would not be safe to off-load men in a personnel basket in a "significant eight-foot sea" with winds of 25 to 30 miles per hour. Various testimony pegged the wave height at between six and eight feet. Although this is admittedly a close issue, we conclude that based upon the testimony at trial, the jury had a sufficient evidentiary basis to conclude that Graham negligently allowed the transfer.

III.

Graham also contends that it should be forced to pay only the portion of damages proportionate to its share of fault. But it is a well-settled principle of maritime law that every one of several tortfeasors is liable for the full amount of an injured plaintiff's damages. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992); *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).[1]

AFFIRMED.

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[1] Because of the jury's unchallenged finding that Bertrand was not contributorily negligent, the issue raised in the partial dissent in *Simeon* is not present in this case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

KEVIN P. BERTRAND, ET AL

VERSUS

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL

CIVIL ACTION NO. 90-2452

(Filed Mar. 11, 1993)

MINUTE ENTRY

I.

Pending before the Court is the motion to alter or amend judgment and/or motion for rehearing or reconsideration, filed by John E. Graham & Sons (Graham).

II.

Graham's motion raises two points. First, the motion points out that I erroneously stated that I dismissed Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) because the claims against it were time-barred. Graham is correct that the reason for Mobil's dismissal was that there was insufficient evidence to support a claim of negligence against Mobil.

Second, the motion urges me to reconsider my denial of Graham's earlier Rule 59 motion. For the reasons stated in my earlier ruling, I decline to reconsider my ruling on Graham's motion.

III.

Accordingly, except as state [sic] above, Graham's motion to alter or amend judgment and/or motion for rehearing or reconsideration is DENIED.

Lafayette, Louisiana, this 10th day of March, 1993.

/s/ W. Eugene Davis
United States Circuit Judge
(Sitting by Designation)

Judgment Entered 3-15-93

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

KEVIN P. BERTRAND, ET AL

VERSUS

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL

CIVIL ACTION NO. 90-2452

(Filed Feb. 18, 1993)

Judge Davis
Magistrate Methvin

RULING ON MOTION

I.

Pending before the court are the motions of John E. Graham & Sons, Inc. (Graham) for judgment as a matter of law and/or for a new trial. After a review of the record, I have determined that the motions should be denied.

II.

Kevin Bertrand (Bertrand) brought this personal injury action against Mobil Oil Exploration & Producing Southeast, Inc. (Mobile [sic]) in October of 1990. He added Grace Offshore Corporation (Grace), and Graham as defendants in March of 1992. Bertrand alleged that he sustained injuries to his neck in December of 1989 while being transferred from the M/V MISS SYBIL, operated by

Graham, to a rig owned by Grace and drilling a well for Mobil.

At the close of Bertrand's case, I concluded that Bertrand's claims against Mobile [sic] and Grace had prescribed. I therefore dismissed plaintiffs' case against those defendants. The case proceeded against Graham. The jury found that Bertrand suffered damages in the amount of $346,000.00 due to the negligence of Grace and Graham. In addition, the jury apportioned fault between Grace and Graham at fifty percent each.

III.

A motion for judgment as a matter of law may be granted if there is "no legally sufficient evidentiary basis" for the jury's verdict. Fed. R. Civ. P. 50(a). A new trial is warranted if the jury's verdict went against "the great weight of the evidence." Fed. R. Civ. P. 59; **Shows v. Jamison Bedding, Inc.**, 671 F.2d 927, 930 (5th Cir. 1982); **Cruthirds v. RCI, Inc.**, 624 F.2d 632, 636 (5th Cir. 1980).

The thrust of Bertrand's claim is that Graham negligently allowed the transfer to take place in rough weather and high seas. Bertrand's expert, Captain Timothy Torrence (Torrence) testified that a "significant eight-foot sea" would put the top ten percent of seas at 10 feet and the highest sea at 15 feet. He further testified that it would not be "safe to offload men in a personnel basket" in such weather: "if I had seas eight to ten foot, I would not offload personnel." Asked to further assume winds of 25 to 30 miles per hour, he said that the offloading would be even "more difficult."

Captain Torrence's testimony gave the jury a predicate for finding that Graham acted negligently if the significant seas were 8 feet or more and winds were 25 to 30 miles per hour. Therefore, reduced to its essence, our question is whether the jury was entitled to find that there were significant seas of 8 feet or more and winds of 25 to 30 miles an hour at the time of the transfer.

Defendant's weather expert, Richard Faurot (Faurot), testified about the weather conditions in the area of South Marsh Island 205 around midnight of the night of the transfer. Rig records indicated that winds were at "23 knots, 24 knots and 26 knots" and "getting stronger." He later testified that 26 knots is roughly equivalent to 30 miles per hour. At South Marsh Island 108, rig records indicated significant waves of three feet, with a maximum wave of eight feet. At South Marsh island 136, significant waves of six feet, with the maximum wave being nine feet were observed by rigs. He defined "Significant wave height" as "the average of the one third highest wave." By "maximum wave" he meant the "ones you see once every hour or two."

Bertrand testified that the waves near the rig reached ten to twelve feet. He further testified that the personnel basket collapsed on the deck of the M/V MISS SYBIL, and that the headache ball of the personnel basket touched the deck of the boat. Steve Manville (Manville), who was transferred with Bertrand, partially corroborated Bertrand's testimony. He testified that the waves were six to ten feet, that the personnel basket partially collapsed, and that the headache ball reached head level.

Although it is a close call, I conclude that this evidence is sufficient to support the jury's verdict. I also conclude that the jury's verdict was not against the great weight of the evidence. Accordingly, Graham's motion for judgment as a matter of law and/or motion for new trial is DENIED.

Lafayette, Louisiana, this 18th day of February, 1993.

/s/ W. Eugene Davis
United States Circuit Judge
(Sitting by Designation)

Judgment Entered 2-22-93

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

KEVIN P. BERTRAND, ET AL

VERSUS

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL

CIVIL ACTION NO. 90-2452

(Filed Nov. 10, 1992)

MINUTE ENTRY

I.

Kevin Bertrand ("Bertrand") brought this personal injury action against Mobil Oil Exploration & Producing Southeast, Inc. ("Mobile [sic]) in October of 1990. He added Grace Offshore Corporation ("Grace"), and John E. Graham & Sons, Inc. ("Graham") as defendants in March of 1992. Bertrand alleged that he sustained injuries to his neck in December of 1989 while being transferred from the M/V Miss Sybil, operated by Graham, to a rig owned by Grace and drilling a well for Mobil.

At the close of Bertrand's case, I concluded that Bertrand's claims against Mobile [sic] and Grace had prescribed. I therefore dismissed plaintiffs' case against those defendants. The case proceeded against Graham. The jury found that Bertrand suffered damages in the amount of $346,000.00 due to the negligence of Grace and

Graham. In addition, the jury apportioned fault between Grace and Graham at fifty percent each.

Before entering final judgment, this court must decide two issues. First, it must decide what effect to give to the jury's finding of fault against Grace. Second, it must decide whether Bertrand should recover prejudgment interest from Graham. After considering the memoranda submitted by the parties, I conclude that Graham is jointly and solidarily liable for the entire amount of the verdict, and that it must pay prejudgment interest, from the date of judicial demand, on Bertrand's prejudgment damages. These issues are considered below.

II.

Graham argues that it is only liable to Bertrand for fifty percent of the amount of the verdict. I disagree. Maritime law has traditionally recognized the concept of joint liability between tortfeasors. Under this rule, a plaintiff has a right to collect all of his damages from one party in the event he is unable to obtain the relative portion of damages from each party at fault. **Gele v. Chevron Oil Co.**, 574 F.2d 243 (5th Cir. 1978).

Edmonds v. Compagnie Generale Transatl., 433 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) ("Edmonds"), confirms the continued vitality of this traditional rule. In that case an injured longshoreman received benefits for his injury from his employer, a stevedoring concern, under the Longshoremen's and Harbor Workers' Compensation Act ("Longshoreman's Act"). He then brought a negligence action under general maritime law against a shipowner. **Edmonds**, 433 U.S. at 258. A jury found the

plaintiff stevedoring company and shipowner 10, 20, and 70 percent at fault, respectively. Although the employer was immune from suit and not required to respond in judgment to its employee, the Supreme Court held the shipowner liable for 90 percent of the plaintiff/employee's damages.

In so holding, the Supreme Court acknowledged the current force of the traditional rule, "which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing." **Edmonds,** 433 U.S. at 268. The Court considered the possibility that Congress, through the Longshoreman's Act, intended to change this traditional rule. However, the Court found no support in the act for such an "unlikely" and "important and controversial change in existing law." **Edmonds,** 433 U.S. at 266. Moreover, the Court resisted the temptation to change the rule of joint liability on its own for fear of destroying the "delicate balance" that Congress had struck when it enacted the Longshoreman's Act. **Edmonds,** 433 U.S. at 273.

The Fifth Circuit recently acknowledged the rule of joint and several liability, explaining that it "permits a plaintiff to obtain full legal redress from any defendant, even if that defendant's actions were not solely responsible for the plaintiff's injuries." **Hardy v. Gulf Oil Corp.,** 949 F.2d 826, 829 (5th Cir. 1992). In another case, the Fifth Circuit allowed a plaintiff to recover from a defendant vessel that portion of the prejudgment interest that it was statutorily barred from recovering against the United States. **Transorient Navigators Co., S.A. v. M/S Southwind,** 788 F.2d 288, 294 (5th Cir. 1986). The court stated:

"An innocent plaintiff may recover his full damages from any one of two or more joint tortfeasors, leaving that tortfeasor to seek contribution or indemnity from its co-tortfeasors." **Transorient,** 788 F.2d at 294.

Graham attempts to distinguish **Edmonds** and limit its application to cases where a tortfeasor is shielded from a tort suit because of the Longshoreman's Act. This distinction is not persuasive. The traditional rule of joint liability operates even when a plaintiff chooses not to pursue his claim against a tortfeasor. **See Simeon v. T. Smith & Son, Inc.,** 852 F.2d 1421, 1428 (5th Cir. 1988) (recognizing "a plaintiff's right to 'sue . . . all the wrong-doers, or any one of them, at his election; . . . [being] entitled to judgment in either case for the full amount of his loss.' ") (citation omitted). We therefore see no reason the rule of joint liability should not apply here where the plaintiff pursued his claim against two tortfeasors, but did not recover against one because of a time bar.

Graham also argues that the rule of joint liability does not operate where it would lead to a "palpably unfair" result. However this argument places undue reliance on such cases as **United States v. Reliable Transfer Co., Inc.,** 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), and **Leger v. Drilling Well Control, Inc.,** 592 F.2d 1246 (5th Cir. 1979). These cases do not address the issue of joint liability; the former deals with allocation of damages among defendants as a result of proportional fault, while the latter deals with allocation of damages among defendants as a result of pretrial settlements with the plaintiff.

III.

Under general maritime law, an award of prejudgment interest for those damages that the plaintiff has incurred as of the date of the judgment are "well-nigh automatic." **Simeon,** 852 F.2d at 1435. Bertrand filed suit against Graham nearly 28 months from the date of his injury. Graham argues that this delay constitutes a "peculiar circumstance" which supports the denial of an award of prejudgment interest. This Court disagrees.

In the Fifth Circuit, the fact that a plaintiff "improperly delayed resolution of the action" may constitute a "[p]eculiar circumstance" justifying a denial of prejudgment interest. **Reeled Tubing, Inc. v. M/V Chad G,** 794 F.2d 1026, 1028 (5th Cir. 1986) ("Reeled Tubing"). However, delay unaccompanied by impropriety does not constitute a "peculiar circumstance." For example, in **Reeled Tubing,** the Fifth Circuit held that the plaintiff was entitled to prejudgment interest even though it filed suit one year after it suffered its loss. The Court said: "Reeled Tubing's failure to file suit for one year following the loss was not the result of improper delaying tactics. . . . " **Reeled Tubing,** 794 F.2d at 1028.

For this reason, Graham's reliance on **Petro United Term v. J.O. Odfjell Chem. Carriers,** 756 F.Supp. 269 (E.D. La. 1991) ("Petro United"), is misplaced. In **Petro United,** the court declined to award prejudgment interest to the plaintiff because: (1) the plaintiff filed suit two years after the loss, and received a continuance three days before the trial date; (2) the respective fault of the parties was never clearly defined; and (3) in pleadings

and settlement discussions the plaintiff demanded substantially more than the court ultimately awarded. **Petro United,** 756 F.Supp. at 275. No eleventh-hour continuance or additional "peculiar circumstances" is present here.

Alternatively, Graham argues that this Court should award prejudgment interest only from the date of judicial demand. I agree. The Second and Seventh Circuits have indicated that a trial court has greater discretion to deny prefiling interest than to deny prejudgment interest altogether. **Independent Bulk Transport, Inc. v. The Vessel "Morania Abaco",** 675 F.2d 23, 25 (2d Cir. 1982); **United States v. Peavey Barge Line,** 748 F.2d 395, 402 (7th Cir. 1984). The Fifth Circuit has not yet addressed this issue, but has said: "An unreasonable delay in filing suit may constitute" a circumstance "when a trial court may properly exercise its discretion to award prejudgment [interest] only to the date of judicial demand." **Reeled Tubing,** 794 F.2d at 1029 & n. 1.

I conclude that Bertrand's 28 month delay in filing suit against Graham was "unreasonable." Bertrand knew, early on, of his claim against the boat owner. Moreover, Graham's identity was readily discoverable from Mobile [sic]. Bertrand points to the lengthy pendancy of a remand motion as his reason for waiting 28 months to file suit against Graham. The district court, however, did not stay discovery. So there is no explanation in the record that justifies this lengthy delay. Therefore, this court chooses to award prejudgment interest only from the date of judicial demand.

In exercise of its broad discretion to set the rate of interest on a judgment, this Court chooses to follow the

procedure established in 28 U.S.C. § 1961. **Reeled Tubing,** 794 F.2d at 1029.

Counsel for Mr. Bertrand and the intervenor are directed to submit a judgment consistent with this ruling to Mr. Gaudet for approval within five days and to the court five days thereafter.

Lafayette, Louisiana, this 6th day of November, 1992.

/s/ W. Eugene Davis
United States Circuit Judge
(Sitting by Designation)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

KEVIN P. BERTRAND, ET AL	CIVIL ACTION
VERSUS	NO. 90-2452
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL	JUDGE SHAW
	MAGISTRATE METHVIN

(Filed Dec. 7, 1992)

FINAL JUDGMENT

This matter was called before the Court pursuant to a previous fixing as a jury trial on the merits beginning September 28, 1992 and ending September 30, 1992; the Honorable W. Eugene Davis, United States Circuit Court Judge (sitting by designation) presiding.

PARTIES:

KEVIN P. BERTRAND and JERRI LOUISE HOFFPAUIR BERTRAND, plaintiffs, represented by R. Scott Ramsey, Jr. of the Law Offices of R. Scott Ramsey, Jr., Ltd.; and

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC. and JOHN E. GRAHAM & SONS, defendants, represented by W. Gerald Gaudet of Voorhies & Labbe; and

GRACE OFFSHORE COMPANY, INC., defendant, represented by Michael M. Christovich of Christovich & Kearney; and

INSURANCE COMPANY OF NORTH AMERICA, intervenor, represented by Michael J. Remondet of Jeansonne & Briney.

The Court, after considering the applicable law, evidence, pleadings, testimony of witnesses, argument of counsel, Motions of the parties, special interrogatories to the jury, the jury verdict dated September 30, 1992, and minute entry of this Court dated November 6, 1992, renders the following Judgment, to-wit:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Judgment As a Matter of Law filed on behalf of the defendant, MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., be and the same is hereby granted and the claims of the plaintiffs are dismissed against said defendant.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Judgment As a Matter of Law filed on behalf of the defendant, GRACE OFFSHORE COMPANY, INC., be and the same is hereby granted and the claims of the plaintiffs are dismissed against said defendant.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Judgment As a Matter of Law filed on behalf of the defendant, JOHN E. GRAHAM & SONS, be and the same is hereby denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Judgment As a Matter of Law filed on behalf of the plaintiffs, KEVIN P. BERTRAND and JERRI LOUISE HOFFPAUIR BERTRAND, be and the same is hereby denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that expert witness fees are hereby fixed and taxed as cost of court as follows:

A.	Captain Timothy Torrence	$40.00
B.	Dr. Donald Judice	$40.00
C.	Dr. Steven Snatic	$40.00

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that JOHN E. GRAHAM & SONS pay to the plaintiff, KEVIN P. BERTRAND, the sum of THREE HUNDRED FORTY-SIX THOUSAND AND NO/100 ($346,000.00) DOLLARS, together with legal interest thereon as provided in 28 U.S.C.Section 1961 on the sum of NINETY-EIGHT THOUSAND FIVE HUNDRED AND NO/100 ($98,500.00) DOLLARS from date of judicial demand upon John E. Graham & Sons until paid, and all cost of these proceedings.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the intervenor, THE INSURANCE COMPANY OF NORTH AMERICA, and against the plaintiff, KEVIN P. BERTRAND, ordering the plaintiff to pay to the intervenor from the sum recovered by the plaintiff herein from the defendant, JOHN E. GRAHAM & SONS, the sum of all compensation benefits paid which up to the date of trial totaled EIGHTY THOUSAND SEVEN HUNDRED TWENTY-FIVE AND 68/100 ($80,725.68) DOLLARS, and judicial interest thereon as provided by 28 U.S.C. Section 1961 from the date of judicial demand by the Intervenor upon the plaintiff until paid.

JUDGMENT READ RENDERED AND SIGNED at Lafayette, La., Louisiana this 4th day of December, 1992.

/s/ W. Eugene Davis
UNITED STATES CIRCUIT
COURT JUDGE

Judgment Entered 12/9/92

FORM OF JUDGMENT APPROVED BY:

LAW OFFICES OF R. SCOTT RAMSEY, JR., LTD.

/s/ R. Scott Ramsey, Jr.
R. SCOTT RAMSEY, JR., #11098
Attorney for Plaintiff, Kevin P. Bertrand
P. O. Drawer 185
Berwick, Louisiana 70342
(504) 395-9247

VOORHIES & LABBE

/s/ W. Gerald Gaudet
W. GERALD GAUDET
Attorney for John E. Graham & Sons
P. O. Box 3527
Lafayette, Louisiana 70502-3527
(318) 232-9700

JEANSONNE & BRINEY

/s/ Michael J. Remondet, Jr.
MICHAEL J. REMONDET
Attorney for Insurance Company of North America
P. O. Box 91410
Lafayette, Louisiana 70509
(318) 237-4070

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

PRESENT:

HON. W. EUGENE DAVIS, CIRCUIT JUDGE — September 28, 1992 DATE

SITTING BY DESIGNATION , JUDGE, Presiding

GEORGE JONES , Court Reporter

GARY BRAZELL , Minute Clerk

COURT OPENED: 9:30 AM/~~XX~~

COURT ADJOURNED: 5:20 ~~XX~~M/PM

MINUTES OF COURT

CASE NO. 90-2452

KEVIN P. BERTRAND, ET AL VS. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC., ET AL

APPEARANCES

R. Scott Ramsey, Jr.	FOR	Plaintiff
	FOR	
W. Gerald Gaudet and Robert M. Kallam	FOR	Defendant Mobil Oil Exploration & Producing
	FOR	Southeast Inc. and John E. Graham & Sons

	FOR	
Michael M. Christovich	FOR	Defendant Grace Offshore Co.
	FOR	
Michael J. Remondet, Jr.	FOR	Intervenor, Insurance co. of North America

CASE CALLED FOR

___ Hearing on motions
___ Jury selection only
X Trial with/~~without~~ jury 1st day
___ Other _____

FILINGS: _____

PROCEEDINGS:

X Witnesses sequestered
X Opening statement – plaintiff
X Opening statement – defendant
X Testimony & evidence for pltf., not concluded
___ Testimony & evidence for deft., not concluded
___ Rebuttal testimony & evidence, not concluded
___ Evidence closed
___ Evidence left open for _____
___ Case argued
___ Jury instructed
___ Alternate juror(s) excused
___ Jury deliberations began at ___ AM/PM
___ Jury verdict returned at ___ AM/PM
___ Jury polled
___ Case ruled on by the Court – See below
___ Case taken under advisement
___ Briefing times – See below
___ Mistrial declared

JURORS SELECTED & SWORN TO TRY CASE:

(1) #33 Margie B. Seaux
(2) #35 Harry L. Prudhomme
(3) #36 Vincent Corey Williams
(4) #37 Rosslind B. Falterman
(5) #38 Debra L. O'Donnell
(6) #42 Wiltz Paul Champagne, Jr.
(7) #44 Angela Sam
(8)
(9)
(10)
(11)
(12)
(Alt)
(Alt)

VERDICT, RULING, COMMENTS: A pretrial conference was held in chambers.

It was jointly stipulated by and between Court and counsel that a jury of seven (7) would be selected to try the case and that should it become necessary for the Court to excuse one (1) juror for good cause, case to be tried by and submitted to the remaining six (6) jurors for decision.

Stipulation by and between counsel read into record.

Case laid over to the following day at 9:00 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

PRESENT:

HON. W. EUGENE DAVIS, CIRCUIT JUDGE	September 29, 1992 DATE
SITTING BY DESIGNATION ,	JUDGE, Presiding
GEORGE JONES ,	Court Reporter
GARY BRAZELL ,	Minute Clerk

COURT OPENED: 9:00 AM/~~XX~~M

COURT ADJOURNED: 5:20 ~~XX~~M/PM

MINUTES OF COURT

CASE NO. 90-2452

KEVIN P. BERTRAND, ET AL	VS.	MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC., ET AL

APPEARANCES

R. Scott Ramsey, Jr.	FOR	Plaintiff
	FOR	
W. Gerald Gaudet and Robert M. Kallam	FOR	Defendant Mobil Oil Exploration & Producing
	FOR	Southeast Inc. and John E. Graham & Sons

Michael M. Christovich	FOR	Defendant Grace Offshore Co.
Michael J. Remondet, Jr.	FOR	Intervenor, Insurance co. of North America

CASE CALLED FOR

___ Hearing on motions
___ Jury selection only
_X_ Trial with/~~without~~ jury 2nd day
___ Other _____

FILINGS: Motion for Judgment as a Matter of Law on behalf of defendant Mobil Oil & Producing Southeast Inc.; Motion for Judgement as a Matter of Law on behalf of defendant Grace Offshore Co.; Motion for Judgement as a Matter of Law on behalf of defendant John E. Graham & Sons.

PROCEEDINGS:

___ Witnesses sequestered
___ Opening statement – plaintiff
___ Opening statement – defendant
_X_ Testimony & evidence for pltf., ~~not~~ concluded
_X_ Testimony & evidence for deft., not concluded
___ Rebuttal testimony & evidence, not concluded
___ Evidence closed
___ Evidence left open for _____
___ Case argued
___ Jury instructed
___ Alternate juror(s) excused
___ Jury deliberations began at ___ AM/PM
___ Jury verdict returned at ___ AM/PM

___ Jury polled
___ Case ruled on by the Court – See below
___ Case taken under advisement
___ Briefing times – See below
___ Mistrial declared
___

JURORS SELECTED & SWORN TO TRY CASE:

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____
(7) _____
(8) _____
(9) _____
(10) _____
(11) _____
(12) _____
(Alt) _____
(Alt) _____

VERDICT, RULING, COMMENTS: Motion filed at the close of evidence and testimony of plaintiff for Judgement as a Matter of Law on behalf of defendant Mobil Oil Exploration & Producing Southeast Inc., argued, submitted and GRANTED.

Motion filed at the close of evidence and testimony of plaintiff for Judgment as a Matter of Law on behalf of

defendant Grace Offshore Company, argued, submitted and GRANTED.

Motion filed at the close of evidence and testimony of plaintiff for Judgement as a Matter of Law on behalf of defendant John E. Graham & Sons, argued, submitted and DENIED.

Case laid over to the following day at 9:00 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

PRESENT:
HON. W. EUGENE DAVIS, CIRCUIT JUDGE — September 30, 1992 DATE

SITTING BY DESIGNATION
/JOHN M / SHAW , JUDGE, Presiding

GEORGE JONES , Court Reporter

GARY BRAZELL , Minute Clerk

COURT OPENED: 9:00 AM/~~PM~~

COURT ADJOURNED: 6:35 ~~PM~~/PM

MINUTES OF COURT

CASE NO. 90-2452

KEVIN P. BERTRAND, ET AL VS. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC., ET AL

APPEARANCES

R. Scott Ramsey, Jr.	FOR	Plaintiff
	FOR	
W. Gerald Gaudet and Robert M. Kallam	FOR	Defendant Mobil Oil Exploration & Producing
	FOR	Southeast Inc. and John E. Graham & Sons

Michael M. Christovich	FOR FOR	Defendant Grace Offshore Co.
Michael J. Remondet, Jr.	FOR FOR	Intervenor, Insurance co. of North America

CASE CALLED FOR

___ Hearing on motions
___ Jury selection only
X Trial with/~~without~~ jury 3rd day
___ Other _____

FILINGS: Exhibits; Special Interrogatories to the jury (verdict).

PROCEEDINGS:

___ Witnesses sequestered
___ Opening statement – plaintiff
___ Opening statement – defendant
___ Testimony & evidence for pltf., not concluded
X Testimony & evidence for deft., ~~not~~ concluded
X Rebuttal testimony & evidence, not concluded
X Evidence closed
___ Evidence left open for _____
X Case argued
X Jury instructed
___ Alternate juror(s) excused
X Jury deliberations began at 12:40 ~~XX~~M/PM
X Jury verdict returned at 6:20 ~~XX~~M/PM
X Jury polled
___ Case ruled on by the Court – See below

___ Case taken under advisement
___ Briefing times – See below
___ Mistrial declared

JURORS SELECTED & SWORN TO TRY CASE:

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____
(7) _____
(8) _____
(9) _____
(10) _____
(11) _____
(12) _____
(Alt) _____
(Alt) _____

VERDICT, RULING, COMMENTS: Oral motion on behalf of plaintiff at close of all evidence for Judgement as a Matter of Law on the issue of contributory negligence, submitted and DENIED.

Oral motion on behalf of plaintiff for Judgement as a Matter of Law on the issue of negligence of John E. Graham & Sons, submitted and DENIED.

Oral motion on behalf of defendant John E. Graham & Sons reurging Motion for Judgement as a Matter of Law, submitted and DENIED.

CONTINUED ON ATTACHED SHEET

90-CV-2452
Bertrand, et al v. Mobil Exp & Prod, et al

CONTINUATION OF MINUES OF COURT, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFATETTE-OPEALOUSAS [sic] DIVISION, IN LAFATETTE [sic],

IT IS ORDERED that the United States Marshal furnish the jury a meal during its deliberations.

Special Interrogatories to the jury were answered, signed by the foreperson and VERDICT RENDERED. Copy attached hereto.

IT IS ORDERED that judgement be entered in accordance with the verdict.

Jury excused by the Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

KEVIN P. BERTRAND, ET AL

VERSUS

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL

CIVIL ACTION NO. 90-2452

(Filed Oct 1, 1992)

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that plaintiff, Kevin P. Bertrand, sustained injury on December 10, 1989, as he was transferring from the MISS SYBIL to the Mobil Platform?

Answer **YES** or **NO:** YES

NOTE: In you answer "NO" to question one, you need not proceed further. The foreperson should sign and date the verdict form and return it in open court.

If your answer to question one is "YES," proceed to Number two.

2. Do you find from a preponderance of the evidence that John E. Graham & Sons was negligent in the manner claimed by Kevin P. Bertrand and that such negligence was a proximate cause of damages to Mr. Bertrand under the circumstances given to you?

Answer **YES** or **NO:** YES

NOTE: If you answer "NO" to question two, you need not proceed further. The foreperson should sign and date the verdict form and return it in open court.

If your answer to question two is "YES," proceed to Number three.

3. Do you find from a preponderance of the evidence that Grace Offshore Corporation was negligent in the manner claimed by Mr. Bertrand and that such negligence was a proximate cause of damages to Mr. Bertrand under the circumstances given to you?

Answer **YES** or **NO:** YES

4. Do you find from a preponderance of the evidence that Kevin Bertrand was himself negligent in the manner claimed by John E. Graham & Sons, Inc., and that such negligence was a proximate cause of his own damages under the circumstances given to you?

Answer **YES** or **NO:** NO

5. What proportion or percentage of Mr. Bertrand's damages do you find from a preponderance of the evidence to have been legally caused by the respective parties?

Answer in terms of percentages:

John E. Graham & Sons, Inc. 50%

Grace Offshore Corporation 50%

Plaintiff, Kevin P. Bertrand 0%

NOTE: The percentages that you assigned above must total 100%.

6. Without regard to any percentages that you may have given in answer to question 4, state the entire amount of damages sustained by Kevin P. Bertrand as a result of the accident until date of trial.

Answer in dollars:

A. Bodily injury, pain and suffering, disability, mental anguish, loss of capacity for enjoyment of life $17,500

B. Loss of earning capacity $53,000

C. Medical benefits $28,000

7. Without regard to any percentages that you may have given in answer to question 4, state the entire amount of damages sustained by Kevin P. Bertrand as a result of the accident in the future after this trial.

Answer in dollars:

A. Bodily injury, pain and suffering, disability, mental anguish, loss of capacity for enjoyment of life ..... $ 17,500

B. Loss of earning capacity $200,000

C. Medical benefits ..... $ 30,000

SO SAY WE ALL.

Lafayette, Louisiana
September 30, 1992

/s/ Wiltz Paul Champagne, Jr.
FOREPERSON

(2)

FILED
APR 13 1994
OFFICE OF THE CLERK

No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT/INTERVENER INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. REMONDET, JR.
Counsel of Record

JEANSONNE AND BRINEY
Post Office Box 91410
Lafayette, Louisiana 70509
(318) 237-4070
(Bar Roll No. 21046)
Counsel for Respondent/Intervener Insurance Company of North America

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether one joint tortfeasor subject to general maritime law can be held jointly and severally liable to the plaintiff for the fault of another joint tortfeasor subject to state law under the Outer Continental Shelf Lands Act (OCSLA) when the plaintiff's action against the OCSLA joint tortfeasor has been dismissed, as a matter of law, for not being timely commenced?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Kevin P. Bertrand
Plaintiff-Respondent

John E. Graham & Sons
Defendant-Petitioner

Insurance Company of North America
Intervenor

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No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Respondent provided Longshore and Harbor Workers' Compensation Act to the plaintiff's employer. Respondent intervened into the matter seeking to recover longshore benefits paid to or on behalf of the plaintiff, when Kevin Bertrand sustained injury on December 10, 1989 when transferred from a vessel to a fixed platform off the coast of Louisiana. Bertrand originally filed suit in the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana, on or about October 15, 1990. On or about November 8, 1990, Mr. Bertrand's suit was

removed by Mobil to the United States District Court for the Western District of Louisiana. On or about November 16, 1990, the plaintiff filed a motion to remand to the state court. Mobil filed and was granted an extension until December 14, 1990 in which to file responsive pleadings. The one year anniversary from the date of the accident passed during Mobil's extension to file a response to the plaintiff's motion to remand.

The motion to remand remained undecided for almost one year. On or about December 25, 1991, more than one year after the case was removed from the state venue to federal court by Mobil, and almost two years after the accident, an order of the District Court was signed at the request of the plaintiff dismissing his motion to remand allowing the litigation to proceed.

In March, 1992, the plaintiff named as an additional defendant, John E. Graham & Sons ("Graham"), owner/operator of the crew boat in question, and Grace Offshore Company ("Grace"), operator of the crane used in the personnel basket transfer.

Prior to trial, various motions for summary judgment were filed. Included was a motion for summary judgment filed by Mobil seeking dismissal claiming it did not have operational control over the operation which allegedly caused Mr. Bertrand's injury. That motion was denied.

The case was tried beginning on September 28, 1992. At the close of the plaintiff's case, Mobil and Grace were dismissed on their own motion, Mobil as a result of lack of "operational control", and Grace was dismissed because it was not a solidary obligor with a defendant sued within one year.

The jury returned a unanimous verdict on September 30, 1992, assigning fifty percent (50%) fault to Graham and fifty percent (50%) fault to Grace. In a final judgment issued by the District Court, and affirmed by the Fifth Circuit Court of Appeals, Graham was held in judgment for the full damages sustained by Mr. Bertrand.

ARGUMENT

Graham attempts to persuade the Court that *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) is misinterpreted by various circuits of this land. *Edmonds* held the 1972 amendments to the LHWCA did not intend to impose a proportional fault rule so as to change the judicially created admiralty rule that the ship owner can be made to pay all the damages not due to the longshoreman's own negligence.

In the clear and unambiguous words of Justice White:

> "Of course, our conclusion that Congress did not intend to change the judicially created rule that the shipowner can be made to pay all the damages not due to the plaintiff's own negligence does not decide whether we are free to and should change that rule so as to make the vessel liable only for the damages in proportion to its own negligence. Indeed, some amici in support of respondent share the view that Congress did not change the rule but argue that this Court should do so. We disagree.
>
> Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of

their comparative fault, see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to resolve . . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S.Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S., at 112, 94 S.Ct., at 2177; *Halcyon Lines v. Hann Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286, 72 S.Ct., at 279-280. Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results that Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." (443 U.S. at 2762, 2763)

Edmonds has been followed in a case entitled *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir. 1980), cert den. 490 U.S. 1106, 109 S.Ct. 3156.

In *Simeon*, an injured deckhand on a derrick barge brought an action against his employer and a tugboat for damages. The Fifth Circuit followed the guide set forth by this Honorable Court in *Edmonds*, and a preceding case, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), and held:

> "Like the common law, W. Prosser & P. Keeton, Prosser & Keeton on The Law of Torts § 47 at 328 (1984), *the general maritime law has long recognized the concept of joint liability.* For example, in The Atlas, 93 U.S. 302, 23 L.Ed. 863 (1876), the Supreme Court held that the insurer of cargo lost in a collision between two vessels caused by the fault of both could recover all of its damages from one vessel. The Court borrowed this rule from the common law, which recognized a plaintiff's right "to sue . . . all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." Id., at 315, 23 L.Ed. at 866; see also The Alabama, 92 U.S. 695, 23 L.Ed. 763 (1876); The George Washington, 76 U.S. 513, 19 L.Ed. 787 (1870); The Juniata, 93 U.S. 337, 23 L.Ed. 930 (1876); The Sterling, 106 U.S. 647, 1 S.Ct. 89, 90, 27 L.Ed. 98 (1882) (describing the joint liability rule in admiralty as "well-established"). *Neither the Supreme Court nor the lower courts have ever retreated from the rule of joint liability under maritime law.* See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 2756 n. 7, 61 L.Ed. 521 (1979); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 2178, 40 L.Ed.2d 694 (1974); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042 (5th Cir. 1985); *Todd Shipyards*

> *Corp. v. Auto Transportation, S.A.*, 763 F.2d 745, 756 (5th Cir. 1985); *Central Rivers Towering, Inc. v. City of Beardstown, Ill.*, 750 F.2d 565, 575 (7th Cir. 1984).
>
> More importantly, defendants ignore the fact that maritime law, which historically has adhered to the rule of joint liability, early on rejected the common law's rule of contributory negligence. See generally M. Norris, 2 The Law of Seamen § 30.32 (1985); The Max Morris, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586 (1890)." (Emphasis supplied). (852 F.2d at 1427, 1428)

As recent as 1992 the Court of Appeals for the Fifth Circuit has followed the Supreme Court's hand and decided *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992). In following *Edmonds*, and *Cooper*, *Hardy* explains:

> "The common law has long held that each and every one of several tortfeasors is liable for the full amount of an injured plaintiff's damages. In its purest application, this rule *of "joint and several liability" permits a plaintiff to obtain full legal redress from any defendant, even if that defendant's actions were not solely responsible for the plaintiff's injuries. Thus, joint and several liability can produce a seemingly inequitable result: one defendant might alone be required to bear the burden of several defendants' wrongs. The courts developed the principles of indemnity and contribution to alleviate this potentially unfair allocation of responsibility.* Indemnity and contribution, although related concepts, are distinguishable. When a trial court applies indemnity principles, it permits one tortfeasor to shift all of the loss onto another tortfeasor, provided that the latter should appropriately answer for the entirety of the loss. Prosser &

> Keeton on The Law of Torts § 50, at 336-41 (5th ed. 1984). When the trial court applies contribution principles, it requires that each tortfeasor pay the proportion of the damages attributable to its actions. Id." (Emphasis supplied). (949 F.2d at 829)

Under the United States Supreme Court rulings and subsequent decisions, an admiralty defendant can be made to pay the full extent of the plaintiff's damages not due to his own negligence. It is up to that admiralty defendant to seek indemnity and/or contribution from other parties to alleviate this potentially unfair problem. If Graham desires contribution, it may have that claim against Grace Offshore in another matter. Graham had every opportunity to name Grace as a third party defendant when the matter was before the District Court. Both the District Court and the Court of Appeals were faced with this argument and ruled in favor of the traditional rule of joint liability. The rule of joint liability applies even when a plaintiff chooses not to pursue his claim against another tortfeasor. Simply put, a plaintiff has a right to sue all the wrongdoers, or any one of them, at his election being entitled to judgment in either case for the full amount of his loss.

CONCLUSION

The arguments made by Graham are neither new nor novel. If Graham feels the result is unsatisfactory, a contribution action is available to it against Grace. There is

no conflict of the circuits and the principal of law directed by this Court in *Edmonds* and *Cooper* are clear.

Respectfully submitted,

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No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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APP

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, JOHN E. GRAHAM & SONS

The recent opinion of this Court in *McDermott, Inc. v. AmClyde*[1] lays to rest a significant issue upon which the Petition for Writ of Certiorari of John E. Graham & Sons (Graham) is founded. In its Petition, Graham requests this Court revisit and explicate the reaffirmation of joint and several liability in maritime law announced in *Edmonds v. Compagnie Generale Transatlanrique*, 443 U.S. 256 (1979). The *McDermott* opinion has done so, at least to the extent that on the facts of this case a potentially dispositive issue has been resolved in Graham's favor.

Graham has argued, at every level, that the doctrine of joint and several liability cannot be used to cast a defendant in judgment for a co-defendant's liability when the co-defendant is dismissed because the plaintiff failed to timely prosecute the co-defendant.[2] The *only* reason the trial court dismissed the co-defendant, Grace Offshore Company, Inc. (Grace), was because the plaintiff, Kevin P. Bertrand, did not timely file suit against Grace. Nothing beyond Bertrand's control, such as insolvency or legislative tort immunity, deprived him of recovery against Grace. He merely slept on his rights.

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[1] No. 92-1479 (U.S. Apr. 20, 1994) (1994 WL 135219).

[2] At page 12 of the petition, Graham states:
[W]hen the harm from which joint and several liability protects the plaintiff is one solely a product of his own making, application of [joint and several liability] loses all validity.

In *McDermott*, this Court revisited *Edmonds* in response to the argument of the respondent that the proportionate share rule (calculation of a nonsettling defendant's liability based on its percentage of fault) was inconsistent with *Edmonds*. The *McDermott* opinion reads *Edmonds* as reaffirming joint and several liability, but then explicates the doctrine's application, stating:

> [Joint and several liability] can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than the innocent plaintiff, responsible for the shortfall.

Slip op. at 8.[3]

Joint and several liability protects plaintiffs from factors limiting their recovery that are beyond their control. The inequitable results engendered by the doctrine cannot otherwise be justified. The trial and appellate courts

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[3] Another consideration the *McDermott* opinion addresses that is applicable to this case is judicial economy. The burden imposed upon courts and litigants by ancillary contribution actions was a prime consideration for rejecting one of the three options advanced by the American Law Institute (pro tanto set off with right of contribution against the settling defendant) for calculating a nonsettling defendant's liability. *McDermott*, slip op. at 5. That burden applies with equal force to reject joint and several liability when use of the doctrine to protect a plaintiff whose recovery is limited by factors solely within his control unjustly results in a court having to entertain an anciliary contribution action.

did not recognize this limiting aspect of joint and several liability and cast Graham in judgment for Bertrand's damages caused by Grace.

The limits on joint and several liability command a different result. The trial court's dismissal of Grace because Bertrand failed to timely commence his cause of action against Grace is a limitation upon Bertrand's recovery that is solely the product of his own making. No outside forces can be blamed. Consequently, joint and several liability cannot be applied to hold Graham responsible for Bertrand's damages caused by Grace.

For these reasons and the reasons previously assigned in the Petition for Writ of Certiorari, Graham respectfully requests this Court grant the Petition.

Respectfully submitted,

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